

DIVISION III

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
SAM BIRD, Judge

CA06-220

OCTOBER 4, 2006

HENRIETTA ENGLISH, EMPLOYEE  
APPELLANT

APPEAL FROM THE WORKERS'  
COMPENSATION COMMISSION, [NO.  
F403700]

V.

WAL-MART ASSOCIATES, INC.,  
EMPLOYER,  
CLAIMS MANAGEMENT, INC.,  
INSURANCE CARRIER APPELLEES

AFFIRMED

Appellant Henrietta English appeals from a decision of the Workers' Compensation Commission denying her claim for benefits as a result of an accident that occurred while she was working for appellee Wal-Mart Associates, Inc. She contends (1) that the Commission's decision that she failed to prove she sustained a compensable injury to her back was not supported by substantial evidence; (2) that the Commission's decision that she failed to prove she sustained an aggravation of a pre-existing condition was not supported by substantial evidence; and (3) that the Commission's decision to deny temporary total disability benefits was not supported by substantial evidence. We affirm.

At a hearing before the administrative law judge, English contended that on March 28, 2004, while stocking candy for Wal-Mart, she fell from a ladder and hit a display,

resulting in a new injury to her back or an aggravation of a prior degenerative condition. Wal-Mart controverted the claim, contending that English could not establish a compensable injury or aggravation rising out of or in the course of her employment, identifiable by time and place of occurrence, and supported by objective, measurable physical findings.

English testified that she was employed with Wal-Mart on March 28, 2004, and that she worked as a stocker in the candy section. At 6:15 or 6:30 a.m. on the morning of her shift, English was stocking Easter baskets on the candy aisle when she “went up on the ladder to put a box of chocolate candy up.” She said that the next thing she knew, she fell. She claimed that she “screamed out” and that she hit a display box as she fell backwards. She claimed that she hit her back, her buttocks, her side, and her arms on the floor. She said that she was “pretty much flat” after the fall. She claimed that she was “screaming” and “crying” and that another store employee, George Hunt, came to her “rescue.” English also claimed that the store manager, Ramona Johnson, came to assist and that Hunt and Johnson tried to get her up from the floor, but could not. According to English, Johnson “got a wheelchair” because she could not get up.

English said that she requested an ambulance but never got one. She also claimed that she was never offered medical treatment by her employer. She said that she went to the hospital with a girlfriend who came and picked her up. She stated that she was “in a great deal of severe pain” and that she “couldn’t hardly walk.”

English said that she was not having problems with her back before she fell on March

28. She admitted that she had previous problems with her back but said that she had not seen a doctor about her back since 1991. At some point between 1991 and the March 28, 2004, accident, English had worked at a maximum-security prison, which required strenuous physical activity. She claimed at the hearing that she was currently unable to “do anything like [she] used to.” Specifically, she said that she could not play ball with her grandson, could not roller skate with him, and was unable to work.

On cross-examination, English admitted that she had filed a prior workers’ compensation claim in 1991, but said that it was not a “similar” injury. She explained that she went to the emergency room at 5:15 p.m. on the date of the 2004 accident, and that she had gone home to “get some sleep” before having a girlfriend drive her to the emergency room.

George Hunt testified that he was employed at Wal-Mart on the date of the accident and that he assisted English after she fell. He said that another employee informed him that English had fallen and he immediately contacted management and went to help her. When he found her, English was “on the floor with her back up against the pallet and she was grimacing like she was in a lot of pain.” He attempted to help her up, but could not, so he helped get a wheelchair for her.

Ramona Johnson testified that she was the co-manager on duty on the date of the accident. Johnson said that she did not recall English asking for an ambulance. She said that she explained to English that if she went to the doctor or to the emergency room it might be

an out-of-pocket expense, depending on whether the claim was covered under Wal-Mart's policy. Johnson said that when she saw English on the floor after the accident, she was "moaning" and "seemed to be in pain." She stated that English was aware that a member of management would have to accompany her to the doctor or the emergency room.

Cheryl Phillips testified that she was the assistant manager on duty on March 28, 2004. She said that she asked English about needing medical attention and that English did not request it at that time, nor did English ask for an escort to the emergency room. Phillips said that Wal-Mart contacted English three days after the accident and requested that she see the company doctor, but she was "argumentative" and eventually "walked out" of the doctor's office. English did, however, subsequently visit the company doctor.

Medical records indicate that on the date of the accident, Dr. Bell, the emergency room physician, diagnosed a "contusion" to the back and prescribed Flexeril. A few days later, English was examined by Wal-Mart's company doctor, Dr. Gerald Morris. He reported that English said she was in "major pain" and rated her pain as a "10" on a scale of "1 to 10." He noted that an MRI performed on the date of the accident "did not show fracture or disc injury," other than some lower lumbar degeneration. He diagnosed English with "lumbar strain," prescribed pain medication, and recommended physical therapy. After several follow-up visits with Dr. Morris, English discontinued physical therapy. Dr. Morris noted that English's physical therapist said she had some "vague suspicions" that English was complaining of agonizing pain, but made "purposeful movement." Dr. Morris also noted that

the therapist said English would often refuse to have the treatment suggested, but then would agree to proceed with treatment while extremely emotional and “crying all the time.” English was subsequently referred to Dr. Kenneth Rosenzweig, an orthopedic surgeon.

On April 20, 2004, English was evaluated by Dr. Rosenzweig. He noted that she reported “extremely severe” pain that was “getting worse with time.” He ordered an MRI based on English’s complaints of “radicular symptoms.”<sup>1</sup> His report indicated no prior neck or back problems before the March 28 accident. In a letter dated June 1, 2004, Dr. Rosenzweig responded as follows to the question of whether he observed any objective findings to support an injury:

The physical examination suggested significant irritability consistent with sciatica, possibly from a disk protrusion with nerve root impingement. The majority of findings can have subjective overlay. Additional information such as an MRI is needed to confirm whether this claimant truly sustained an injury pattern. She may have sustained a contusion only and an exacerbation of underlying degenerative changes or she may have truly sustained an injury from her claim. ...

During a subsequent deposition, Dr. Rosenzweig was informed of English’s prior history of back problems,<sup>2</sup> and stated as follows when asked about her current injury:

Had I know[n] her history that she hand wrote was not an accurate reflection of her past, I probably would have been a little more suspicious. And it’s certainly possible that she had a minor event but having been through this before, she knew how to participate in examination to reflect more of a major event.

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<sup>1</sup> According to English, this MRI was never performed.

<sup>2</sup> As the law judge noted, the medical records in this case are “replete” with evidence that English had received treatment for back injuries prior to the 2004 incident, including a 1991 back injury for which she reported to the emergency room and for which she sought workers’ compensation benefits, and a 2001 back injury for which she was admitted to the hospital overnight.

So I don't know that I can answer with reasonable medical certainty yes or no.

On July 29, 2004, English went to Dr. Jon Dodson, a general practitioner. Dr. Dodson reported that English suffered "injury" to her neck and back with "palpable muscle spasm." He noted English's complaints of "severe pain," with some pain radiating to her left leg. He also noted "no upper extremity radicular symptoms" and described her past history as "noncontributory." He said that her symptoms were "consistent with a musculo-ligamentous sprain of the cervical and lumbar spine and a herniated lumbar disc secondary to the recent accident." He ordered an MRI, but it was never performed. During a subsequent deposition, Dr. Dodson opined within a reasonable degree of medical certainty that English's fall resulted in an aggravation of her pre-existing degenerative disk disease. However, he said it was possible that he could change his opinion if he knew that she had suffered several injuries other than those she related to him. English did not see Dodson after September of 2004.

In an opinion filed on July 13, 2005, the administrative law judge denied benefits to English, stating as follows:

[English] has failed to prove by a preponderance of the evidence that she sustained a compensable back injury, or aggravation, arising out of and during the course and scope of her employment on March 28, 2004, or to establish a causal connection between her employment and her injury, within a reasonable degree of medical certainty.

....

In this case, no objective medical findings exist to establish that a work-related back injury, or aggravation of same, occurred on March 28, 2004. The only findings that do exist were the results of admittedly subjective tests and were in reliance upon

claimant's history as told to her physicians by her. Moreover, based upon the medical records, claimant obviously failed to disclose a complete, accurate medical history to her treating physicians. Even Dr. Dodson – the only physician who did opine that claimant sustained an injury or aggravation of her prior condition on March 28, 2004, “within a reasonable degree of medical certainty” – acknowledged that his conclusions were subjectively based and that his opinion regarding causation could change if he were to obtain information that claimant had experienced additional prior injuries with the same or similar symptoms.

A number of factors brought forth in this case work together to constrain claimant's credibility, in this examiner's opinion. Those factors include: the lack of any witness to claimant's alleged fall, coupled with her refusal, initially, to see the company doctor; the suspicions on the part of the physical therapist that claimant's efforts were not reliable; claimant's obvious failure to disclose an accurate medical history to her medical providers since this alleged incident; and, claimant's ceasing of medical care since September of 2004, while still complaining at the hearing that she is unable to work and continues to require pain medication today.

In short, claimant has simply failed to prove by a preponderance of the credible evidence that she sustained any compensable back injury, or aggravation, on March 28, 2004.

In an opinion filed on December 16, 2005, the Workers' Compensation Commission adopted and affirmed the decision of the law judge. English now appeals the Commission's decision.

In reviewing decisions of the Arkansas Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings, and we affirm if the decision is supported by substantial evidence. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, \_\_\_ S.W.3d \_\_\_ (Nov. 30, 2005). Substantial evidence is that which a reasonable person might accept as adequate to support a conclusion. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have

reached the conclusions arrived at by the Commission. *Id.* The substantial evidence standard of review requires that we affirm if the Commission’s opinion displays a substantial basis for the denial of relief. *Id.*

Furthermore, the determination of the credibility and weight to be given a witness’s testimony is within the sole province of the Commission. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.* The Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Id.*

*Whether Substantial Evidence Exists to Support Commission’s Determination that No Compensable Injury Occurred*

English first contends that there was no substantial evidence to support the Commission’s determination that no compensable injury occurred. The statutory definition of “compensable injury” includes the following:

An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2003). Furthermore, a compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Objective findings are those that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16)(A). Medical opinions addressing

compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16).

The claimant must also prove a causal relationship between the employment and the injury. *Horticare Landscape Mgmt. v. McDonald*, 80 Ark. App. 45, 89 S.W.3d 375 (2002). However, objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and a work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

To support this point, English claims that “the existence of other possible causes of injury does not mean that she has failed to meet her burden of proof.” She then proceeds with a lengthy discussion of how the accident on March 28, 2004, caused her injuries. She fails to recognize, however, that the Commission—by adopting the law judge’s opinion—based its decision on its finding that *no compensable injury occurred*.

We note English’s argument that there were objective findings of an on-the-job injury, as well as objective findings of a progression of worsening symptoms from her pre-existing degenerative disk disease. She asserts that the presence of degenerative disk disease at any level is indicative of an “unstable situation in the back,” and that “any specific trauma can cause ... a worsening situation.”

Here, the Commission adopted the law judge’s opinion that the only findings in this case were subjective and “in reliance upon claimant’s history as told to her physicians by her.” There was evidence before the Commission that English failed to inform her physicians of her

prior history of back injury, and that even the opinion of Dr. Dodson—the only physician to opine within a reasonable degree of medical certainty that English had sustained an injury from the March 2004 accident—might have changed had he known of her prior history. This failure, along with the facts that there were no witnesses to the March 28, 2004 incident, that English initially “walked out” of the company doctor’s office, that English’s physical therapist had “vague suspicions” about the reliability of English’s efforts, and that English’s last documented medical care was in September 2004, clearly diminished English’s credibility in the opinion of the law judge and the Commission.

The Commission also noted that the first reported observable muscle spasm in English’s back was four months after the alleged injury and that all physicians who treated her more contemporaneously to the alleged incident denied the presence of muscle spasms or any other objective finding. The Commission’s decision, adopted from the law judge, noted the following medical evidence: Although the emergency room physician diagnosed a contusion to the back on March 28, 2004, he observed no bruising or muscle spasms, and there was no notation of swelling in the emergency room records; Dr. Morris’s notes of April 2, 2004, reflected no mention of any obvious objective findings such as bruising, swelling, or spasms; Dr. Rosenzweig, who examined English on April 20, 2004, stated that he observed no bruising, swelling, or muscle spasms.

Thus, substantial evidence supports the Commission’s finding that English “failed to prove by a preponderance of the evidence that she sustained a compensable back injury, or aggravation, arising out of and during the course of her employment.” We hold that the

Commission's decision displays a substantial basis for the denial of English's claim for a compensable injury.

*Whether Substantial Evidence Exists to Support Commission's Determination that No Aggravation Occurred*

English also contends that there was no substantial evidence to support the Commission's determination that no aggravation occurred. The employer takes the employee as he finds her, and employment circumstances that aggravate pre-existing conditions are compensable. *St. Vincent Infirmary Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). However, an aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

English argues that "medical evidence supported by objective findings is not essential in every case," and further asserts that this court has "never required that a doctor be absolute in an opinion" or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, she insists that this court has simply held that a medical opinion be more than "speculation." However, she offers no authority for these assertions, and such arguments are clearly misguided when it comes to proving a compensable injury or aggravation. Our law plainly states that "[a] compensable injury must be established by medical evidence supported by objective findings." Ark. Code Ann. § 11-9-102(4)(D). As stated above, an aggravation must meet the requirements for a compensable injury; thus, an aggravation must also be established by objective medical evidence.

English additionally relies upon *Williams v. L&W Janitorial, Inc.*, 85 Ark. App. 1, 145 S.W.3d 383 (2004), to support this point. However, in that case, we held that an admittedly compensable injury suffered by the claimant was a factor in her need for additional surgery and, thus, she was entitled to benefits. Here, according to the Commission, there was no compensable injury. Thus, *Williams* is inapposite to this case.

As discussed above, the Commission's decision displays a substantial basis for the denial of English's claim for a compensable injury. It therefore follows that the Commission's decision also displays a substantial basis for the denial of her claim for an aggravation.

*Temporary Total Disability Benefits*

As her third point, English claims that there was no substantial evidence to support the Commission's decision to deny temporary total disability benefits. Because we have decided that the Commission's decision displays a substantial basis for the denial of English's claim for a compensable injury or aggravation, we need not address this contention. Moreover, the law judge's opinion, which was adopted by the Commission, did not address temporary total disability benefits.

For these reasons, we affirm.

Affirmed.

PITTMAN, C.J., and NEAL, J., agree.